

Kokeh (Migration) [2021] AATA 3906 (25 June 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Edward Kokeh

VISA APPLICANTS: Mrs Joan Konah Kokeh
Ms Lydia Dahn
Ms Rhema Dahn

CASE NUMBER: 1818410

DIBP REFERENCE(S): **BCC20172342242**

MEMBER: Justin Meyer

DATE AND TIME OF ORAL DECISION AND REASONS: 25 June 2021 at 3:32 pm (VIC time)

DATE OF WRITTEN RECORD: 7 July 2021

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the decisions under review with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

Statement made on 7 July 2021 at 4:02pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 309.211

CASES

He v MIBP [2017] FCAFC 206

APPLICATION FOR REVIEW

2. This is an application for review of decisions made by a delegate of the Minister for Immigration on 9 May 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) Subclass 309 visas under the *Migration Act 1958* (the Act).
3. At the hearing on 25 June 2021 the Tribunal made an oral decision and gave an oral statement of decision and reasons. The following is the written record of those reasons.

STATEMENT OF DECISION AND REASONS

4. The visa applicant has applied for a subclass 309 partner provisional visa and made that application on 30 June 2017, based on her relationship with you. And the delegate made a decision which refused that visa application and the delegate made that decision on 9 May 2018. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy clause 309.211.
5. That particular clause 309.211 and also clause 309.221 require that the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen. And in the present case, the visa applicant claims to be your spouse.
6. The tribunal has given consideration to your application and notes that you are an Australian citizen. The issue in the present case is whether the visa applicant is your spouse, and spouse gets a definition in section 5F of the Act, provides that the person is the spouse of another where the two persons are in a married relationship.
7. The person is in a married relationship, must be married to each other for the purposes of the Australian law and there must be a mutual commitment to a shared life together to the exclusion of all others. The relationship must also be genuine and continuing and the couple must not live separately or apart on a permanent basis.
8. In forming an opinion as to these matters regard must be had to all the circumstances of the relationship, including evidence of the financial and social aspects and the nature of the visa applicant and sponsor's household, their commitment to each other, as set out in the regulations, particularly regulation 1.15A3.
9. You have submitted a number of documents to the department in support of the genuineness of your relationship and in this review application to the tribunal you have submitted a number of additional documents which relate to the development and continuation of the relationship.
10. Those documents include a very substantial number of photos of you and the visa applicant in a variety of places and situations with a large number of people, including at your wedding ceremony. There is also a considerable amount of personal correspondence from both electronic and text messaging and other platforms, and I take note of all of those documents.
11. You and the visa applicant, I find, to have been married in the Republic of Liberia and evidenced by a marriage certificate of the office of registrar of marriages and that notes the parties marrying – date of marriage 4 February 2017. There are witnesses attached, I find that you have a marriage registration and find that the parties were validly married. And I find that the marriage is valid for the purposes of the Act, as required by section 5F 2A.

12. The tribunal has to consider all the circumstances of the relationship, including the matters specified in rule 1.15A3 in determining whether you and your sponsor are in a married relationships, as defined in section 5F. And whether the relationship falls within the definition of spouse. In assessing those issues, the tribunal has had regard to all documents on the department file, as well as the documents submitted to the tribunal.
13. Financial aspects – the tribunal examines the evidence that you have submitted and finds that the parties are aware of each other’s financial arrangements.
14. You do not appear to have joint ownership of assets but I consider your position – people living in separate countries who have different financial needs, and I find that you are sufficiently aware however, of each other’s financial arrangements and you are aware of each other’s household income living arrangements.
15. I find that a considerable amount of money and cash has been forwarded to your wife over the years, through the years, and there is evidence of wire service transfers, and other money transfer arrangements which are evidence for a considerable period on file and I also accept both parties’ oral evidence of this.
16. I accept that your income is in the order of around AUD800 a week, give or take, and I find that your wife was well aware of this. There is no other evidence of joint assets or pooling of assets but the tribunal puts little weight on that, noting that you and the visa applicant live in separate countries.
17. I have also considered the nature of the household. You and your wife have given consistent evidence that you have stayed together during your visits to Liberia, which is your – both of your home country and to (indistinct).
18. I find that you have visited the visa applicant on a number of separate occasions, you have taken time out from work and spent months with her, I find that you have rented a house on a short-term basis on a number of occasions and lived in a typical household arrangement where you’ve also assisted with caring for your children and I find that the parties have cared for children together. These are the biological children of the visa applicant and not your biological children, but you treat these children as your own. You were able to identify the details and location of the homes in which you have stayed, and I accept your evidence that you lived together at various periods since your marriage.
19. I accept your evidence and the visa applicant’s evidence that you intend to establish a household together by living in it in a family home in Melbourne, or elsewhere in Australia. I find the only reason why you are living separately and not living together is because you are living in different countries and the visa applicant is aware of your daily household life and you are aware of hers.
20. Social aspects: The tribunal is satisfied that the relationship is supported by your family and friends and the tribunal notes particularly (indistinct) witness Mr Nia Derato, who is present in the hearing, is an uncle who was able to attend your wedding ceremony and has met your wife on other occasions. And he has put in a statutory declaration. There is another declaration on file as well testifying to you as a genuine couple, I find that you are socially recognised.
21. The tribunal notes that your marriage ceremony was attended by a large group of people and that you gave notice of that and there is photographic evidence of the parties marrying and socialising with others in different situations through the years.

22. I find that the visa applicant was able to corroborate your evidence about people you know and she was able to identify with ease, relatives, friends and social characteristics and I find that there is social recognition at a level that the tribunal was satisfied that you planned to undertake and join social activities in the future.
23. Commitment to each other. The tribunal gives weight to the fact that you have known the visa applicant since you were both effectively teenagers, and that you had a friendship after you leaving to go to Australia. There was a break in which you didn't have contact, which is totally understandable. But you were motivated to contact her and for her to contact you later on in 2011.
24. From that time onwards, I find that you were entering into a relationship, you were adults at that point and that you began talking about marriage and that you talked about marriage and considered marriage in a spontaneous way and there was no contrivance of that marriage.
25. The tribunal has noted the delegate's decision and although respectfully notes that there was only limited information available to the delegate, the tribunal disagrees with the delegate's finding that there was a lack of exclusivity and that it was not a loving relationship that was generated in the 2000s.
26. The tribunal finds that this is a misunderstanding on the part of the delegate. The tribunal notes that the delegate interviewed apparently the visa applicant only (but not the sponsor) and the tribunal is unsure of the reasons for this, but having spoken to both parties, it is of the view that a much clearer picture is obtained this way.
27. The tribunal considers other sub-aspects of the commitment head and notes that the duration of relationship is at least for a decade, the persons have lived together over a period of months, they have a high level of companionship, they have contacted one another constantly and have evidenced that to the tribunal in writing.
28. They give emotional support to each other and draw emotional support from one another. They were able to discuss long-term plans such as building a house, educating their children, having more children and also gaining more skills in the workforce in Australia. And the tribunal also notes with commendation that the sponsor has been hard working and has supported his family over a prolonged period from overseas. The tribunal found that the visa applicant and the sponsor could talk spontaneously about each other's personality, about their emotional reactions to different matters and how they supported one another in trying times. And the tribunal also notes that the applicant and the sponsor produced witnesses and also statutory declarations that are supportive of the narrative that they put forward. And the tribunal finds them to be truthful witnesses.
29. In short, the tribunal accepts your evidence that you and the visa applicant have maintained regular contact and that you have a genuine and continuing relationship. And considering all the evidence cumulatively, you and the visa applicant have demonstrated and continued to demonstrate a level of commitment to each other and to your relationship as contemplated in the regulations. The tribunal also notes that you provide mutual care and responsibility for children together.
30. The tribunal makes the following findings, that the marriage is valid for the purpose of the Act, as required by section 5F 2A. At the time of application and at the time of decision, you and the visa applicant had a mutual commitment to a shared life to the exclusion of all others and the relationship is genuine and continuing.
31. You therefore meet the requirements of section 5F 2B and section 5F 2C for the married relationship. The tribunal is satisfied that at the time of application and time of decision, you

and the visa applicant do not live separately and apart on a permanent basis and accordingly, you meet the requirements of section 5F 2D for a married relationship.

32. The tribunal then will find that at the time of the visa application and that the visa applicant was your spouse within the meaning of section 5F and that you are an Australian citizen and meet the requirements in clause 309.211(2) of schedule two to the regulations.
33. Further, the tribunal finds that at the time of the tribunal's decision, the visa applicant continues to be your spouse and meets clause 309.221 of schedule two. For these reasons, the tribunal finds that at the time of the application, you and the visa applicant were in a married relationship within the meaning of section 5F2 of the Act.
34. The tribunal further finds that at the time of the decision, you continued to be in a married relationship, therefore the visa applicant meets clause 309.211 and clause 309.221. Given the findings above, the appropriate course is for the tribunal to remit the application back to the minister to consider the remaining criteria for a subclass 309 visa.

DECISION

35. The Tribunal remits the decisions under review with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Justin Meyer
Member